COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3463-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY H. BAHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: DAVID G. DEININGER and JAMES R. BEER, Judges. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Jeffrey H. Bahn appeals from a judgment[1] convicting him of three counts of second-degree sexual assault contrary to

[1] The judgment of conviction was entered by Judge David G. Deininger.

§ 940.225(2)(a), STATS., one count of false imprisonment contrary to § 940.30, STATS., and one count of misdemeanor battery contrary to § 940.19(1), STATS., and from an order denying his postconviction motion for a new trial.[2] We affirm.

The convictions arose out of two incidents involving a woman with whom Bahn had a relationship. The parties began a relationship in September 1994 and began living together in March 1995. The first incident occurred in December 1994 at a hotel and resulted in charges of second-degree sexual assault and misdemeanor battery. The second incident occurred in July 1995 in the bedroom of the apartment Bahn and the victim shared and resulted in two charges of second-degree sexual assault, false imprisonment and misdemeanor battery.[3]

On appeal, Bahn questions evidentiary rulings, contends that a juror should have been excused for bias, and decries the assistance he received from trial counsel and the failure to sever for trial the counts relating to each incident charged in the information. For the reasons which follow, we reject these claims.

Bahn argues that the trial court failed to explore the possible bias of a juror who later become the foreperson of the jury. The juror, a registered nurse at an area clinic, stated that he was acquainted with the State's two police officer witnesses due to his work "on the psych unit and in the ICU." The juror stated that he could be a fair and impartial juror in spite of this familiarity. The juror also acknowledged familiarity with a physician who was a defense witness and another individual identified as a potential defense witness. As to the physician, the juror denied any possible bias. As to the potential witness, the juror indicated that he

[2] The postconviction order was entered by Judge James R. Beer.

[3] Bahn was acquitted of misdemeanor battery relating to this incident.

"guessed" his knowledge of the potential witness would not compromise his ability to sit as an impartial juror. Bahn argues that the trial court erred by not questioning the juror more closely about possible bias relating to the potential defense witness.

"A determination by the circuit court that a prospective juror can be impartial should be overturned only where bias is 'manifest.'" ***State v. Louis,*** 156 Wis.2d 470, 478-79, 457 N.W.2d 484, 488 (1990). Such a finding is implicit in the fact that the juror remained on the panel in the case before us. "Bias may be either implied as a matter of law or actual in fact" and "the appearance of bias should be avoided." ***Id.*** at 478, 457 N.W.2d at 487-88. "Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." ***Id.*** at 478, 457 N.W.2d at 487.

Here, the record does not disclose implied or actual bias with regard to the juror's familiarity with the police officers or the potential defense witness. Our supreme court has held that police officers are not per se ineligible for jury service simply by virtue of their profession. *See* ***id.*** at 483, 457 N.W.2d at 490. If police officers may serve as jurors in the absence of other specific circumstances compelling their exclusion from the jury, a juror's acquaintance with police officers, without more, is not grounds for disqualification from jury service. Additionally, in this case, the juror clearly stated that his familiarity with the officers would not result in bias or partiality. We see no actual or implied bias on this record.

We also reject Bahn's claim that the juror's less emphatic assertion that his familiarity with a potential defense witness would not bias him should have been grounds for removal from the jury. Our disposition is premised on an

uncontested fact: the witness never testified at trial. Also, in the end, the juror stated that he could be impartial with regard to this witness. Bahn has not sustained his burden to show implicit or actual bias. Finally, we note that Bahn never moved the trial court to dismiss the juror for bias.[4] Therefore, we fail to see how the juror's service had any impact on Bahn's trial.

Bahn argues that the trial court erroneously admitted evidence that a butcher knife was used to lock the apartment bedroom door during the July 1995 incident. He does not dispute that the knife was so used.[5] However, he claims that evidence of the knife was irrelevant and prejudicial.

All relevant evidence is admissible unless its admission is constitutionally or statutorily prohibited or its probative value is substantially outweighed by other factors, including the risk of unfair prejudice. *See* ***State v. Lindh***, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991). The admission of evidence is within the discretion of the trial court and its rulings in that regard will not be overturned on appeal absent a misuse of discretion. *See* ***id.*** at 348-49, 468 N.W.2d at 176. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984).

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[4] Bahn did not use one of his peremptory strikes to dispose of this juror. While we are aware that it is reversible error not to dismiss a prospective juror for cause and force a defendant to exercise a peremptory challenge to that juror, *see* ***State v. Ramos,*** 211 Wis.2d 12, 24-25, 564 N.W.2d 328, 334 (1997), this is not a ***Ramos*** case. Here, the prospective juror did not manifest implied or actual bias such that he should have been dismissed for cause.

[5] Bahn was not bound over on a charge that the knife was used as a dangerous weapon in committing the July 1995 crimes.

The trial court declined to exclude all references to the knife at trial because of the role it played in the July 1995 incident and the fact that its use as a door lock was a historical fact which the jury was entitled to hear to avoid speculation as to why the victim did not leave the room in which she was attacked.

Bahn correctly concedes that the knife was relevant to the false imprisonment charge. False imprisonment requires the confinement or restraint of the victim. *See* § 940.30, STATS.; *see also* ***State v. C.V.C.,*** 153 Wis.2d 145, 154, 450 N.W.2d 463, 466 (Ct. App. 1989). However, confinement or restraint does not occur if there is some reasonable means of escape. *See* ***C.V.C.***, 153 Wis.2d at 154, 450 N.W.2d at 466.

The victim testified that the knife held the door closed, she could not remove it or open the door, and Bahn physically restrained her and confined her in the bedroom. Another witness testified that she could not open the door when she heard a commotion. The State did not make improper use of this evidence and did not unduly emphasize it. In closing arguments, the prosecutor restricted his comments about the knife to its use as a lock, a fact relevant to the false imprisonment charge. We conclude that a police officer's isolated reference to the knife as a possible weapon did not defeat the relevancy of the knife for the purpose we have described.[6] The knife was relevant to the false imprisonment charge and was properly part of the factual account of the means of confinement. We discern no misuse of discretion in admitting evidence of the knife.

Bahn next contends that the trial court erred in admitting evidence that he had been violent with the victim on occasions other than those charged in

[6] The victim specifically testified that Bahn did not threaten her with the knife.

the information. In particular, Bahn challenges evidence that he sexually assaulted the victim on a previous occasion and repeatedly physically abused her.

Section 904.04(2), STATS., specifically excludes evidence of other crimes or acts when such evidence is offered "to prove the character of a person in order to show that he acted in conformity therewith." ***State v. Shillcutt,*** 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd,* 119 Wis.2d 788, 350 N.W.2d 686 (1984). However, the statute does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2). This list is not exhaustive, *see* ***Shillcutt,*** 116 Wis.2d at 236, 341 N.W.2d at 720, and we have held that evidence of other acts committed by a defendant is admissible to place the charged crime in context, *see* ***id.*** at 236-37, 341 N.W.2d at 720.

The State presented expert testimony that this case involved "battered woman's" syndrome. Evidence of the parties' relationship was relevant to this theory and helped to place the victim's recantation of some of her accusations against Bahn into context. A psychotherapist testified regarding the features of this syndrome and the "cycle of violence" which can include the victim's recantation of her accusations and delays in reporting episodes of abuse. The evidence of previous sexual assaults was also relevant to Bahn's knowledge of the victim's lack of consent on the occasions charged in the information. We conclude that there was a logical or rational connection between the other acts evidence and facts of consequence to the determination of the action being tried. *See* ***State v. Alsteen,*** 108 Wis.2d 723, 729-30, 324 N.W.2d 426, 429 (1982). Moreover, other acts evidence is admissible to provide background or to place the charged crimes in context. *See* ***State v. Hereford,*** 195 Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995).

Bahn argues that the trial court should have severed the December 1994 and July 1995 incidents for trial. We have already held that previous incidents of violence in the parties' relationship were admissible as other acts evidence. Had the charges been severed, evidence of each charged incident would have been admissible as other acts evidence in the other case. *See* ***State v. Bettinger,*** 100 Wis.2d 691, 697, 303 N.W.2d 585, 588 (1981). Therefore, severing the counts for trial would not have restricted the evidence presented at trial. In the absence of substantial prejudice to the defense, severance was not warranted. *See* ***State v. Hoffman,*** 106 Wis.2d 185, 209-10, 316 N.W.2d 143, 157 (Ct. App. 1982). We see no misuse of the trial court's discretion in declining to sever the 1994 and 1995 incidents for trial. *See* ***id.*** at 209, 316 N.W.2d at 157.

Bahn claims that he was denied the effective assistance of trial counsel because counsel (1) withdrew a request for an adjournment due to the absence of a defense witness; (2) failed to advise Bahn of the strength of the State's case as part of considering a plea agreement which offered a five-year sentence; and (3) failed to introduce at sentencing a tape-recorded conversation between Bahn and the victim which Bahn claims proved that the victim fabricated her allegations. As a preliminary matter, we conclude that the last assertion is wholly undeveloped in the appellant's brief and we decline to address it. We will not independently develop a litigant's argument and therefore we will not consider this issue. *See* ***Vesely v. Security First Nat'l Bank,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985). We turn to the remaining two allegations of ineffective assistance of counsel.

Ineffectiveness of counsel occurs when counsel performs deficiently and the deficient performance prejudices the defendant. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch,*** 124 Wis.2d 628,

633, 369 N.W.2d 711, 714 (1985). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. *See* ***id.***

Bahn argues that Jeff Larson was an essential defense witness who was hospitalized at the time of trial. Bahn contends that Larson would have testified that the victim never complained to him of an earlier, uncharged sexual assault. That incident allegedly occurred in September 1994, shortly after the parties met. Larson was the owner of the residence where the assault allegedly occurred. Bahn contended that the parties had consensual sex on that occasion. Trial counsel sought an adjournment in order to produce Larson but later withdrew the request. Bahn contends that the absence of Larson's testimony left the jury with only two accounts of what happened on the dates charged—the victim's and Bahn's.

We are unpersuaded. At the postconviction motion hearing, trial counsel testified that Larson was not credible and that he and Bahn agreed to proceed without him. We see no prejudice because Larson would not have been able to testify that no sexual assault occurred at his home. Rather, his testimony would have been limited to the fact that the victim never told him that she was assaulted there. Bahn was not prejudiced by the absence of Larson's testimony.

As for Bahn's claim that counsel inadequately advised him regarding the State's plea offer, we conclude that counsel did not perform deficiently in advising Bahn regarding the plea offer. Counsel testified at the postconviction motion hearing that he conveyed the written plea offer to Bahn and advised Bahn

of the risks and benefits of the plea and that there was a substantial risk if he went to trial. Counsel let Bahn choose whether to accept the plea offer. Based on this evidence, the trial court discerned no deficient performance.

Trial counsel's representation must be equivalent to that which the ordinarily prudent attorney, skilled and versed in criminal law, would give to clients who had privately retained his or her services. *See* ***State v. Harper,*** 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973). In applying the "prudent-lawyer" standard, we consider if trial counsel's decisions were based on the law and the facts as they existed when trial counsel's conduct occurred and upon which an ordinarily prudent lawyer would have then relied. *See* ***State v. Felton,*** 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983). The postconviction record reveals that trial counsel met the prudent-lawyer standard in the manner in which he advised Bahn of the risks of going to trial and the benefits of the plea bargain.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.